STATE OF MICHIGAN

COURT OF APPEALS

STEVEN PATRICK DOUSE, Plaintiff-Appellee,	UNPUBLISHED December 18, 2007
v	No. 274230 Kent Circuit Court
FARM BUREAU GENERAL INSURANCE COMPANY, Defendant-Appellant.	LC No. 05-007711-NF

Before: Bandstra, P.J., and Meter and Beckering, JJ.

PER CURIAM.

Defendant Farm Bureau General Insurance Company appeals as of right the October 19, 2006 judgment entered in favor of plaintiff Steven Douse, following rulings on the parties' motions for summary disposition. We affirm in part, reverse in part and remand for further proceedings consistent with this opinion.

On July 12, 2003, plaintiff was involved in an automobile accident, which he alleges caused him to suffer back and neurological injuries. Defendant was plaintiff's no-fault insurer at the time of that accident. Plaintiff submitted an application to defendant for personal protection insurance (PIP) benefits[1] on July 19, 2003. Defendant sent plaintiff a letter, dated February 9, 2004, in which it advised plaintiff that:

> As of the date of this letter we have not been able to obtain documentation to support [that the] injuries claimed are related to the above date of loss.
>
> Farm Bureau is in the process of investigating this claim. As part of our investigation we are requesting that you provided [sic] the complete names and addresses of all medical facilities you have treated with in [sic] the last 3 years.

[1] The statutory phrase is "personal protection insurance benefits," but these benefits are also known as "first-party" or "PIP" benefits. *McKelvie v Auto Club Ins Ass'n*, 459 Mich 42, 44, n 1; 586 NW2d 395 (1998).

> Based on the above we have no alternative but to deny personal injury benefits in relationship to this claim until our investigation has been completed. Once we have completed our investigation we will notify you of our position.

Although plaintiff submitted the requested material promptly, defendant did not notify plaintiff that it was denying his claim until April 11, 2005, at which time it sent a letter advising plaintiff that, because he did not respond to its February 9, 2004 request for additional information and documentation,[2] "the one-year statute for submission has expired" and hence, defendant had "no alternative but to maintain [its] previous denial" of PIP benefits. Plaintiff filed the instant complaint on July 28, 2005, seeking payment of the contested benefits.

Defendant moved for summary disposition under MCR 2.116(C)(7), regarding that portion of plaintiff's expenses incurred before July 28, 2004, pursuant to the one-year-back rule set forth in MCL 500.3145(1). The trial court denied defendant's motion, invoking its equitable powers to estop defendant from asserting the one-year-back rule on the basis that defendant's February 9, 2004 letter induced plaintiff to refrain from filing suit. Thereafter, the trial court granted plaintiff's motion for summary disposition and entered judgment in plaintiff's favor.

Defendant first argues that the trial court erred in denying its motion for partial summary disposition pursuant to the one-year-back rule. We disagree.

This Court reviews the trial court's denial of defendant's motion for summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817(1999). Absent a disputed issue of fact, this Court also decides de novo, as a question of law, whether a limitations period applies. *Novi v Woodson*, 251 Mich App 614, 621; 651 NW2d 448 (2002).

MCL 500.3145(1) provides in relevant part:

> An action for recovery of personal protection insurance benefits payable under this chapter for accidental bodily injury may not be commenced later than 1 year after the date of the accident causing the injury unless written notice of injury as provided herein has been given to the insurer within 1 year after the accident or unless the insurer has previously made a payment of personal protection insurance benefits for the injury. If the notice has been given or a payment has been made, the action may be commenced at any time within 1 year after the most recent allowable expense, work loss or survivors loss has been incurred. *However, the claimant may not recover benefits for any portion of the loss incurred more than 1 year before the date on which the action was commenced.* [Emphasis added.]

"Thus, although a no-fault action to recover PIP benefits may be *filed* more than one year after the accident and more than one year after a particular loss has been incurred . . . § 3145(1) nevertheless limits *recovery* in that action to those losses incurred within the one year preceding

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[2] Defendant acknowledged below that, despite this statement, plaintiff had timely responded to defendant's request for additional information.

the filing of the action." *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 574; 702 NW2d 539 (2005).

In *Devillers, supra* at 577-579, our Supreme Court overruled prior precedent employing "judicial tolling" of the limitations periods set forth in MCL 500.3145(1) from the time an insured filed a claim for benefits with the insurer until the insurer formally denied that claim in cases where the insured pursued its claim with "reasonable diligence." The *Devillers* Court recognized that "courts undoubtedly possess equitable powers" to estop invocation of a limitations period, but noted that such powers have "traditionally been reserved for 'unusual circumstances' such as fraud or mutual mistake," and are "not an unrestricted license of the court to engage in wholesale policymaking." *Id.* at 590. Accordingly, while courts are not "free to cast aside, under the guise of equity, a plain statute such as § 3145(1), simply because" they view it as "unfair," they may employ equitable principles to estop a party from benefiting from the limitations periods set forth therein, in the face of "fraud, mutual mistake, or any other 'unusual circumstance'" so warranting. *Id.* at 591. As this Court noted in *Henry Ford Health System v Titan Ins Co*, 275 Mich App 643, 647 n 1; ___ NW2d ___ (2007), *Devillers* further stated that courts should be reluctant to apply equitable estoppel "absent intentional or negligent conduct designed to induce a plaintiff [to refrain] from bringing a timely action." See, *Devillers, supra* at 590 n 64, quoting *Cincinnati Ins Co v Citizens Ins Co*, 454 Mich 263, 270; 562 NW2d 648 (1997).

The parties agree that had defendant's February 9, 2004 letter unequivocally denied plaintiff's claim, the one-year back rule certainly would apply to bar plaintiff from recovering that portion of expenses incurred before July 28, 2004. And, the same would be true had defendant taken no action at all with respect to plaintiff's claim. However, we agree with the trial court that considering the circumstances of this case, the effect of defendant's February 9, 2004 letter, requesting additional information and promising to advise plaintiff when defendant reached a decision on his claim, was to induce plaintiff to refrain from filing suit until after defendant unequivocally rejected that claim on April 11, 2005. Indeed, despite contacting defendant repeatedly about the status of his claim before that letter was sent, plaintiff ceased initiating contact with defendant about the status of his claim after he received that letter. Therefore, the trial court did not err in invoking its equitable powers to estop defendant from benefiting from the one-year-back rule.

Defendant next argues that the trial court erred in granting plaintiff's motion for summary disposition under MCR 2.116(C)(10). We agree.

We review the trial court's decision to grant plaintiff's motion de novo, considering the record in the light most favorable to the nonmoving party. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). In so doing, we may only consider what was properly presented to the trial court before the trial court rendered its decision on the motion. *Pena v Ingham Co Rd Comm*, 255 Mich App 299, 310; 660 NW2d 351 (2003). When deciding a motion for summary disposition under MCR 2.116(C)(10), a court is to consider the affidavits, pleadings, depositions, admissions, and other documentary evidence submitted in the action to determine whether a genuine issue of material fact exists to warrant a trial. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998); *Rice v Auto Club Ins Ass'n*, 252 Mich App 25, 31; 651 NW2d 118 (2002). The moving party must identify the issue about which it believes no genuine issue of material fact exists and has the initial burden of supporting its position by affidavits,

pleadings, depositions, admissions, and other documentary evidence. MCR 2.116(G)(4), *Veenstra v Washtenaw Country Club*, 466 Mich 155, 163; 645 NW2d 643 (2002); *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999). Once the moving party has met its burden, the nonmoving party may not rely on mere allegations in order to demonstrate that there is a genuine issue of material fact for trial. MCR 2.116(G)(4), *Rice, supra,* at 31. Rather, the existence of a disputed fact must be determined by admissible evidence proffered in opposition to the motion. MCR 2.116(G)(5), *Veenstra, supra,* at 163, *Maiden, supra* at 120. Summary disposition is appropriate where the non-moving party's proffered evidence fails to establish a genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Veenstra, supra* at 164; *Rice, supra*.

To recover personal protection benefits under the automobile insurance policy issued by defendant, plaintiff must establish that his injuries arose out of the ownership, operation, maintenance, or use of a motor vehicle and that as the result of those injuries he incurred reasonable and necessary expenses for his care, recovery or rehabilitation, suffered a compensable work loss, and/or incurred reasonably necessary replacement services. *Nasser v Auto Club Ins Ass'n*, 435 Mich 33, 49-50; 457 NW2d 637 (1990); *Manley v DAIIE*, 425 Mich 140, 169; 388 NW2d 216 (1986) (Boyle, J., concurring in part); *Nelson v DAIIE*, 137 Mich App 226, 231; 359 NW2d 536 (1984); *O'Key v State Farm Mut Auto Ins Co*, 89 Mich App 526, 529; 280 NW2d 583 (1979). Plaintiff moved for summary disposition pursuant to MCR 2.116(C)(10) on the sole basis that defendant lacked a viable defense to plaintiff's claim for benefits. Plaintiff did not set forth the basis of his claim for benefits, nor did he identify the evidence supporting the nature and amount of his claim. In support of his motion, plaintiff relied on the trial court's earlier denial of defendant's motion for partial summary disposition, on defendant's answers to interrogatories [in which defendant indicated that it reserved the right to rely on any documentation contained in the claims file, including plaintiff's medical and employment records, in denying plaintiff's claim], and on his own answers to defendant's interrogatories. Plaintiff also submitted defendant's claims file to the court as supporting his assertion that defendant had not yet identified a viable defense, noting in a footnote that he was doing so only because defendant's responses to interrogatories referred plaintiff to the claims file. However, plaintiff did not state that the documentary evidence established his entitlement to benefits in the first instance. Thus, plaintiff failed to establish as an initial matter that there were no genuine issues of material fact as to his entitlement to benefits or that he was entitled to judgment for those benefits in the amount sought as a matter of law. Indeed, plaintiff's position was that his motion for summary disposition simply was not addressed to "whether plaintiff can prove his case at this point." Considering that plaintiff did not even argue that he "could prove his case" as a matter of law, and made no attempt to show that he could do so in conjunction with his motion, we conclude that the trial court erred in granting plaintiff summary disposition and entering judgment in his favor on that basis.

We affirm in part, reverse in part and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ Patrick M. Meter
/s/ Jane M. Beckering